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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

V.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., URGING REVERSAL

OF COUNSEL:

DAVID CRUMP
Professor of Law
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002

SUSAN CRUMP
Associate Professor of Law
c/o The Legal Foundation
of America
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002
(713) 659-8040
Counsel of Record

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ALLYN R. SIELAFF, Director
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V.

CLIFFORD W. CARRIER,

Respondent.

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, URGING REVERSAL

INTEREST OF AMICI CURIAE

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other

goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

The International Association of Chiefs of Police, Inc. ("IACP"), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publication, legislative reform, and amicus curiae advocacy, IACP seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

Amici curiae anticipate that the Commonwealth of Virginia, which is represented by capable and diligent counsel, will thoroughly brief arguments centering upon the case law. Amici curiae wish to avoid unnecessary duplication of Virginia's arguments, although we agree with those arguments and wish to express support for them. Therefore, this brief instead concentrates upon issues of public policy. Further, although amici agree with Virginia's arguments regarding Respondent Carrier's failure to exhaust state remedies, this brief is confined to the other issue, concerning "cause" for setting aside state procedural rules.

The court of appeals' approach not only conflicts with the prior decisions of this Court, but would interfere with the effective discharge of the duties of the federal courts, to the disadvantage of diligent attorneys, of the citizenry, and of habeas corpus petitioners. Specifically, the court of appeals' approach would force diligent counsel to forego his own judgments concerning the withholding of objections upon marginal issues, solely to prevent the possibility that later judgments by others may result in the labeling of his conduct in ambiguous matters as a "lapse" or an "error." The result would be to emphasize the presentation of lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. As a collateral consequence, the lower court's reasoning would obliterate the distinction between competent and incompetent counsel, unfairly stigmatizing diligent attorneys.

At the same time, the court of appeals' approach would make federal habeas decisions depend upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. It would encourage abuse of the writ, contributing to the burden of less meritorious cases that makes difficult the federal courts' task of identifying truly meritorious habeas claims.

ARGUMENT

A SINGLE INSTANCE IN WHICH A FULLY EFFECTIVE AND COMPETENT ATTORNEY WITHHOLDS AN OBJECTION OR ARGUMENT SHOULD NOT FURNISH "CAUSE" TO SET ASIDE STATE PROCEDURAL RULES ON GROUNDS NOT AMOUNTING TO INEFFECTIVENESS OF COUNSEL.

The court of appeals, below, characterized the defense attorney's withholding of an issue he had fully preserved for appeal in the state system as probably involving a "momentary lapse by counsel." [1] Amici respectfully submit, instead, that the

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1 Carrier v. Hutto, 724 F.2d 396, 402 (1983). Although the court remanded for an evidentiary hearing, it persisted in the asserted

attorney's decision[2] not to detract from his brief with the extremely marginal[3] claim at issue was not a lapse (not even a momentary one), but rather was effective appellate briefing

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belief that "the likelihood of attorney error appears very great." Id. at 402. (Amici respectfully disagree for reasons set forth infra in notes 3-4.)

2 Counsel actually specified the issue in the state appellate court in his allegations of error. If he had failed to object or specify the issue, inadvertence might be a possibility. A mistake is exceedingly unlikely, however, when counsel has not only objected, but has actually specified the error to the appellate court. Thus amici submit that the probability of deliberate, tactical choice is overwhelming, contrary to the court of appeals' opinion. That choice was wise, for reasons set forth infra in notes 3-4.

3 As the dissenting judge said in the court of appeals, "It is highly unlikely that a valid Brady claim can be drawn from this case." 724 F.2d at 404.

The Brady line of cases requires disclosure of evidence that is "favorable" or "exculpatory." E.g., United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Bageley, 53 U.S.L.W. 5084, 5086-88 (U.S.S.Ct. July 2, 1985) (citing Brady requirements of "favorable" and "material" evidence; defining materiality as existing "only if there is a reasonable probability that . . . the result of the trial would have been different"). Respondent Carrier's claim, however, is that disclosure should be required under Brady whenever the information is merely "material" to guilt, even if it is not favorable or exculpatory at all. This argument is the claim Carrier now seeks to press. 724 F.2d 396, 399 (1983) (citing Carrier's argument); Respondent's Memorandum in Opposition to Petition for Certiorari at 2 (unprinted version). It is readily apparent that an experienced appellate lawyer would not have asserted this argument if he had any other arguments with any merit at all.

It is surprising that Carrier has argued "boldly," in the words of the dissenting judge, ". . . that he lost a 'sure thing' reversal." Id. at 405. He "lost" no such thing. Instead, again in the words of the dissenting judge, this extremely marginal claim was wisely not argued because "counsel undoubtedly recognized it as a weak issue." Id.

guided by the sound judgment of an experienced advocate.[4] Competent counsel would not file a brief with numerous less persuasive issues that might interfere with consideration of more persuasive ones. Instead, skillful counsel would do as counsel here did: He would select, from among those issues preserved for appeal, those few arguments that he considered most persuasive.[5]

Nevertheless, for purposes of this argument, amici will argue the issue as framed by the court of appeals. We assume, although convinced it is not this case, a case in which counsel has engaged in a "momentary" lapse through "inadvertence," and has therefore not objected to or briefed one among many issues, although counsel has rendered effective representation overall that has fully satisfied the sixth amendment.[6]

For the reasons that follow, amici submit that the existence of a momentary lapse by effective counsel should not result in the setting aside of state procedural rules. Specifically, the court

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4 Even Carrier here speculates that trial counsel's decision was a "willful abandonment" of what he persists, against all indications, in calling "the winning argument." Memorandum in Opposition at 4 (unprinted version, unnumbered note). The dissenting judge correctly describes trial counsel's decision as "both tactical and wise, as counsel undoubtedly recognized it as a weak issue." 724 F.2d at 405.

Indeed, the extreme unpersuasiveness of the claim which Carrier now so pathetically argues was his one "winning" argument, is itself an indication that the decision was tactical. See supra note 3.

5 See infra notes 7-8 and accompanying text; cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (discussing myriad of issues at trial and holding counsel effective even though he overlooks or omits arguments).

6 The court of appeals said, in fact, that in this case, "Carrier's trial lawyer appears to have performed with diligence and skill," except for his "unexplained failure to appeal the Brady issue." That failure is not "unexplained," but is instead clearly traceable to trial counsel's sound judgment that the Brady argument was meritless. See supra notes 3-4.

of appeals' approach would create a number of harmful results, some of which are discussed in the argument that follows.

1. The court of appeals' approach would force counsel to object to marginal issues and to forego his own judgments concerning the best means of defense, solely to prevent the possibility that later judgments by others may differ on ambiguous matters and may result in the labeling of his conduct as a "lapse" or an "error." The practice of law requires judgment. Often, the choices it presents are ambiguous. Usually, there are risks associated with every available choice. For example, the inclusion of a given allegation of error may appear to increase chances of reversal if it happens to persuade the court, but if other meritorious grounds also exist, the resulting proliferation of grounds may actually detract from the force of the presentation. For this reason, basic texts on appellate advocacy advise the attorney to limit his allegations of error.[7] Similarly, books on trial techniques advise the foregoing of many objections to evidence (a judgment that must be made under ambiguous circumstances, usually within one or two seconds of the event).[8]

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7 "[T]hose who write on appellate practice are unanimously in favor of limiting the number of issues in a brief . . . ." R. Martineau, Modern Appellate Practice: Federal & State Civil Appeals 183 (1978). "Selectivity is . . . essential." R. Stern & E. Gressman, Supreme Court Practice 764 (5th ed. 1983).

After-the-fact criticism of the appellate lawyer's judgment is especially easy because, even though there is a consensus that the issues need to be limited, "there is far less agreement on how the issues should be framed." R. Martineau, supra, at 183.

8 See J. Appleman, Preparation and Trial 842 (1967) ("Counsel should never object unless he has no fear of antagonizing the jury, nor unless he has a definite reason for wanting to keep something out of the evidence and is certain that he can do so successfully); 2 I. Goldstein & F. Lane, Trial Technique sec. 13.02 (1969) ("Objections should be used cautiously . . . .").

Again, second-guessing of a diligent attorney who follows this sound advice is relatively easy.

The court of appeals' opinion would interfere with the exercise of this judgment by rewarding the decision to brief every marginal issue and make every marginal objection. If an attorney failed to make this decision, he would risk being labelled "inadvertent" and as having committed "errors" or "lapses." Of course, the attorney will not be so described if the court reviewing his client's habeas corpus petition later happens to agree with his judgment; the point, however, is that criticism of his performance is unpredictable. Both the attorney's state of mind (i.e., whether he engaged in strategy or was simply "inadvertent") and the choice itself (i.e., whether the strategy, if indeed strategy was involved, was wise) are at issue. Both must be judged in hindsight, by ambiguous indications. Indeed, a good trial attorney may himself be overly critical, in hindsight, of his *own* judgment in an individual objection or argument, even though he has tried the entire case well and indeed even though the particular choice he later inwardly questions was entirely appropriate.

As a consequence of the decision below, a diligent attorney may unfortunately be motivated by the court of appeal's reasoning to reduce such second-guessing, at his client's expense. He can easily do so by suspending his professional judgment and simply objecting indiscriminately to every item of evidence (or by suspending judgment and briefing every conceivable appellate point whether persuasive or not). The court of appeals' approach clearly encourages this behavior by counsel. Conversely, counsel who exercises professional judgment by withholding marginal objections will be penalized, even if his judgment makes him more effective in representing his client. He runs the risk that a court will later disagree with his judgment and describe the withholding of a single objection as an error even though it is clear that counsel's overall performance has been fully competent.

In a lengthy trial, an attorney may be required to make hundreds or even thousands of individual judgments concerning when to object or what to argue. *Cf. Engle v. Isaac*, 456 U.S. 107, 134-35 (1982). It is no more appropriate to characterize such an individual judgment as a "lapse" or "error" than it is to similarly criticize a skilled tennis player who hits a single ball

into the net during a lengthy match. While a skilled tennis player could act with an excess of caution, making sure above all else that he hit no balls into the net, he would do so at great cost to his strategy and to his effectiveness in the contest. He would necessarily forego hard-hitting, vigorous strategies having any risk at all. The same would be true of an attorney who suspended his judgment and concentrated on presenting every objection or argument, irrespective of relative merit.

2. *The court of appeals' approach would unfairly stigmatize loyal and competent counsel.* The court of appeals' approach effectively obliterates the distinction between competent and incompetent counsel, by its unrealistic treatment of the judgments that competent counsel inevitably must make in trials. The most unfortunate direct effect of the lower court's opinion may be the stigma it places upon well prepared, skillful, and loyal defense counsel.[9] In this case, the defense attorney has been publicly determined by a federal appellate opinion to have in "great likelihood" committed an error affecting the defense of his client, owing to his probable "inadvertence." Even though amici submit that trial counsel acted appropriately and indeed skillfully in this choice, amici reluctantly conclude that he would be well advised to notify his malpractice insurance carrier of the court of appeals' characterization. Furthermore, he may well be required to disclose the court of appeals' evaluation of his performance upon applications for certification as a specialist in some States, or even in applications for admission to courts.

Such characterizations understandably prompt resentment in many competent practitioners. They contribute to a climate in which able lawyers often decline to engage in the important public service of criminal defense.[10] If counsel were indeed in-

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9 As one prominent Texas attorney has said in another context, such unfair treatment "will cut you to pieces . . . to such an extent that you will be quite angry, and it only has to happen to you one time and you will never take another criminal case." Speech by Luther Jones, quoted in Crump, The Functions and Limits of Prosecution Jury Argument, 28 S.W. L. J. 505, 537-38 & n.222 (1974).

10 See supra note 9.

effective, the label would be appropriate, and in that event its application would be justified by the interest in appropriate adjudication of constitutional claims. When, however, it reflects a single choice in a competently conducted trial in which many such choices were required, the stigma is not only unfair but is excessively costly to the criminal justice system.

3. The court of appeals' approach inappropriately encourages the perception in criminal defendants that their convictions are due primarily to failures of their attorneys. Few trials are perfect, but most are fair. Characterization of the outcome as dependent upon a momentary lapse of counsel, rather than as the result of a fair trial, converts acceptance of responsibility by a convicted defendant for his offense into blame for the system and defense lawyer that "caused" him to be convicted. The result is lessened respect for the criminal justice system and encouragement of abuse of the writ.

4. The court of appeals' approach tends to emphasize lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. By identifying and selecting for review those issues that counsel, at trial, failed or declined to preserve through "inadvertence," the court of appeals' approach tends to cause less significant issues to occupy the attention of federal courts hearing habeas corpus claims. Almost by definition, an issue that fully competent counsel has failed or declined to raise because of "inadvertence" is likely to be an issue of lesser significance than other issues, in the determination of his client's guilt or innocence. Ironically, it is precisely such less significant issues that the court of appeals' reasoning would most encourage to be presented in petitions for habeas corpus.[10a]

Furthermore, the court of appeals' "inadvertence" test encourages the taking of the grounds of error out of context,

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10a Amici curiae submit that the present case involves precisely such a situation. The omitted argument was omitted because it was insubstantial. See notes 1-4 supra.

divorced from such considerations as the length of the trial, the presence of other significant issues, and the importance of the ground in light of the remainder of the evidence. State procedural rules operating contemporaneously have a healthy tendency to motivate counsel instead to emphasize those matters that counsel considers most important to the determination of the guilt or innocence of the accused.

In this regard, the court of appeals properly recognized that "sandbagging" was *one* concern underlying *Wainwright v. Sykes, supra.* But the court of appeals failed to recognize that sandbagging is *not* the *only* such concern. *E.g., Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas review of litigated fourth amendment issue not available, even though no sandbagging). *Sykes*, as well as *Engle v. Isaac, supra*, are properly understood as having the more general goal of concentrating habeas corpus upon the most deserving cases.[11] Thus numerous commentators have recognized that the bar extends to situations of inadvertence, because they have recognized that sandbagging is not the only concern.[12] Sim-

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11 Sykes, supra, itself lists many other reasons that may underlie a contemporaneous objection rule, including dealing with the matter while memories are fresh, deferring to the trial judge who could assess demeanor, contributing to finality, comity concerns, encouraging sound performance by trial counsel, and inducing the prosecutor to contemplate the error.

Sykes rejects the "sweeping language" of Fay v. Noia, 372 U.S. 391 (1963), particularly its "knowing-and-deliberate waiver rule which applied . . . to individual failures to raise individual substantive objections . . . ." 433 U.S. at 87-88 & n.12. The court of appeals has ignored this language in Sykes and resurrected the rejected "sweeping" approach of Fay and its progeny. Henry v. Mississippi, 379 U.S. 443 (1965), Townsend v. Sain, 372 U.S. 293 (1963).

12 E.g., Note, Habeas Corpus: The Supreme Court Defines the Wainwright v. Sykes "Cause and Prejudice" Standard, 19 WAKE FOREST L. REV. 441, 461-62 (1983); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. PA. L. REV. 473, 508-09 (1978); cf. Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 466 & n. 190 (1980); Goodman & Sallett, Wainwright v. Sykes: The Lower Courts Respond, 30 HASTINGS L. J. 1683, 1717-1719 (1979).

ply put, a standard encouraging habeas filings, precisely *because* an issue was so insignificant that defendant's attorney was inadvertent to it, would have the topsy-turvy result of emphasizing habeas review of weak claims (such as the one in this case) rather than significant ones.

5. The court of appeals' approach would make habeas decisions depend heavily upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. Straight sixth amendment claims of ineffective assistance of counsel are themselves often extraordinarily difficult to determine, even though the standard is an ostensibly objective one, and the trial transcript itself is usually the principal evidence by which the issue is determined.[13] By comparison, the determination required by the court of appeals' reasoning in this case would be far more difficult. To isolate a single choice by counsel, and determine whether it was the result of an inadvertent, momentary lapse as opposed to a reasonable choice (even though falling within the range contemplated by the sixth amendment), would require the court to probe the attorney's subjective mental state at the evanescent moment of the event. In *Strickland, supra* note 13, 104 S.Ct. at 2066, this Court was concerned that "Criminal trials resolved unfavorably to the defendant would increasingly be followed by a second trial, this one of counsel's unsuccessful defense." That effect would be magnified many times if the decision below were to stand.

The most relevant witness is likely to be the defense attorney himself, who will be dependent upon his recall of his thoughts at the time of one choice among many made during a contested trial. A candid response might put the defense attorney in the position of stating that while he does not fully remember his thoughts at the time, he believes that he made a correct tactical choice, but that there were matters he did not consider,

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13 Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984).

Claims of ineffective assistance of counsel are among the most frequent grounds asserted in habeas corpus petitions, and among the most abusively asserted.

that time pressure affected the quality of the decision, that subsequent events have shown the matter to be more (or less) important than he thought at the time, and that the attorney was not then and is not now absolutely certain his choice was appropriate in any event. Such a scenario could apply easily in a case such as the present one. The court of appeals' glib characterization of such an action as presenting "great likelihood" of an error due to lapse or inadvertence conceals what is actually a complex fact finding by the court, made under a standard that is itself ambiguous.

Criminal convictions should not depend on such unreliable and subjective factors in the mind of counsel. *Strickland, supra.* They should instead depend upon an objective appraisal of the adequacy of counsel's performance. Nor should the valuable efforts of federal courts be channeled into inquiries likely to give such unproductive and inconsistent results.

6. The court of appeals' approach would decrease the ability of the federal courts to adjudicate meritorious habeas corpus claims. The sheer number of federal habeas corpus filings has been the subject of frequent commentary.[14] Habeas increases have been further augmented by enormous increases in other state prisoner petitions, particularly mandamus and 1983 claims; prisoner petitions now are 12% of federal dockets.[15] The habeas corpus docket includes cases of significant complexity; for example, capital cases invariably require extensive habeas scrutiny. Such cases often require delays on the order of a

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14 See, e.g., Allen, Schachtman & Wilson, Federal Habeas Corpus and Its Reform: An Empirical Analysis, 13 RUTGERS L. J. 675 (1982); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS—HABEAS CORPUS 1 (1984) (citing "dramatic increase (almost 700%) in habeas corpus petitions in the past 20 years").

15 BUREAU OF JUSTICE STATISTICS, supra note 14, at 2-3. While strict habeas filings have remained at a fairly constant level over the last decade, this entire category of prisoner petitions is the relevant category and has increased significantly.

decade for resolution, and they generate complex collateral questions such as the grant or denial of stays. Even with the inclusion of such serious cases (which presumably exhibit a much higher percentage of relief granted), the proportion of habeas corpus cases in which any kind of release results is exceedingly small.[16] The effort to identify meritorious claims amounts to a search for a needle in a haystack, and that is true even if the courts are not saddled with the disadvantages of the decision below.

Because the decision below would encourage abuse of the writ, it would have a negative impact upon the federal courts' ability to deal with this problem. That effect would be aggravated by the dependence of the outcome upon close issues regarding attorneys' states of mind, as well as by the tendency to emphasize lesser issues of the kind that counsel might overlook through inadvertence.

CONCLUSION

The decision of the court of appeals should be reversed. For the reasons stated by Petitioner Commonwealth of Virginia, the decision below is inconsistent with this Court's prior decisions and is particularly inconsistent with *Wainwright v. Sykes.* In addition, as this amicus curiae brief indicates, there are sound policy reasons for reversal, including the conclusion that the court of appeals' reasoning would cause significant harm while interfering with the fundamental purpose of habeas corpus jurisdiction.

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16 Allen et al., supra note 14, at 694 (1.7% released); BUREAU OF JUSTICE STATISTICS, supra note 13, at 5 (1.8% released). These rates indicate that emphasis on less meritorious cases will reduce attention in meritorious ones, and standards, such as that set by the court of appeals, will actually be counterproductive in that they will decrease the probability of release in the most meritorious cases.

Respectfully submitted,

Susan Crump
Counsel of Record
c/o The Legal Foundation
of America
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040